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NAPSTER: THE CASE FOR THE NEED FOR A MISSING DIRECT INFRINGER

LLEWELLYN JOSEPH GIBBONS*

I. INTRODUCTION

I would like to thank the editors of the *Villanova Sports & Entertainment Law Journal* for inviting me to participate with this distinguished panel of academic and industry experts. The topic of the symposium, "Napster: Innocent Innovation or Egregious Infringement?," is timely and the underlying issue, the use of copyright law to regulate technology, will remain relevant for the foreseeable future. In the long run, however, to paraphrase the immortal words of Abraham Lincoln, the world will little note, nor long remember *A & M Records, Inc. v. Napster, Inc.*¹ and the controversy surrounding this case.² Instead, this case resulted in merely the striking down of one variant of a peer-to-peer file sharing technology and future lawyers and legal commentators will consider the decision an anomaly. Conversely, had the courts held in favor of Napster, it would have been a watershed moment in copyright jurisprudence, on par with *Sony Corp. of America v. Universal City Studios, Inc.*³ As in *Sony*, *Napster* could have marked the birth of a new industry.

* Assistant Professor, College of Law, University of Toledo. Professor Gibbons would also like to thank Ann Bartow, Thomas G. Field, Jr., Theresa McMahon, William Richman, Lars Smith, Daniel Steinbock, John Kheit, Joseph Slater and Chopin Yen for their comments. Professor Gibbons would like to thank the College of Law for a faculty research grant.

1. 14 F. Supp. 2d 896 (N.D. Cal. 2000) ("Napster I"), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001) ("Napster II") (concerning boundary between sharing and theft, personal use and unauthorized worldwide distribution of copyrighted music and sound recordings). A & M Records and seventeen other record companies filed a complaint for contributory and vicarious copyright infringement, violations of section 980(a)(2) of the California Civil Code, and unfair competition against Napster, Inc., an Internet start-up that enables users to download MP3 music files without payment. *See id.*

2. *See* Abraham Lincoln, *The Gettysburg Address, Delivered at Gettysburg on November 19, 1863*, available at <http://www.loc.gov/exhibits/gadd/gadrft.html> (last visited Nov. 18, 2001).

3. 464 U.S. 417 (1984) (ruling on legality of Video Cassette Recorders). In *Sony*, Universal Studios, Inc. and Walt Disney Productions brought a copyright infringement suit against Sony and several of its retailers for manufacturing and selling Betamax video tape recorders (VTR). *See id.* Universal and Disney claimed that because the Betamax VTR was capable of recording off the air television broadcasts, Sony was liable as a contributory infringer. *See id.* The United States Supreme Court adopted the "staple article of commerce" doctrine from patent law and held in favor of Sony. *Id.* at 417-18.

Each new technology displaces or causes changes in dominant economic and legal models governing its predecessor.⁴ New technology, unless co-opted by existing economic interests, always results in a call for regulation or prohibition.⁵ This strident call is often based on Chicken Little's claim that, "the sky is falling," and further fortified with predictions of dire economic effects.⁶ "Examples of such historically threatening technology include piano rolls, phonographs, motion pictures, cable television, photocopiers, videocassette recorders ("VCRs") and Digital Audio Tapes ("DATs")."⁷ Amazingly, when courts ignore these predictions, the sky never falls. Instead, some businesses quickly adapt to the new technology, develop new business models and become even more prosperous.⁸

[I]t is interesting to note that the Supreme Court found against copyright owners in *Sony* despite claims that doing so would seriously undermine the movie industry. For example, Jack Valenti, President of the Motion Picture Association of America, has been quoted as saying that the

4. See Damien A. Reihl, *Peer-to-Peer Distribution Systems: Will Napster, Gnutella, and Freenet Create a Copyright Nirvana or Gehenna?*, 27 WM. MITCHELL L. REV. 1761, 1762 (2001). See generally Sarah H. McWane, Comment, *Hollywood v. Silicon Valley: DeCSS Down, Napster To Go?*, 9 COMM.LAW CONSPICUOUS 87 (2001).

5. See Reihl, *supra* note 4 at 1762.

6. See James M. Burger, "Rock 'n Roll Is Here to Stay:" *Napster and Online Music Distribution*, 19 COMM. LAW. 1, 32 (2001) (noting new technologies open up new markets and applications for existing works and such technologies may lead to use of such works in ways that were not contemplated, let alone legally authorized, by works' owners). "[B]oth the law and the marketplace historically have adapted to new technologies while still allowing content owners to prosper." *Id.*

7. Reihl, *supra* note 4, at 1762-63 (citing *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908)) (holding creation of piano rolls using copyrighted music not infringing act); see also *Sony*, 464 U.S. at 417; *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1362, *aff'd* 420 U.S. 376 (1975) (holding medical journal publisher's photocopying is considered "fair use" because it is non-profit institution devoted to advancement of medical knowledge); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399 (1968) (holding cable television company that relayed copyrighted material did not "perform" work and did not infringe upon Copyright Act of 1909); *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911) (holding "the film BEN HUR was photographic interpretation of copyrighted story, the public exhibition of which constituted infringement"); *Edison v. Lubin*, 122 F. 240, 242 (3d Cir. 1903) (holding motion pictures are similar to photographs, and therefore copyrightable); *Stern v. Rosey*, 17 App. D.C. 562, 565 (1901) (holding "phonograph reproduction did not violate copyright act, since act is not 'publishing' or 'copying' within meaning of statute"); NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA - INTELLECTUAL PROPERTY IN THE DIGITAL AGE*, ch. 2, at <http://books.nap.edu/html/digital-dilemma/ch2.html> (lending libraries viewed as threatening bookstores and publishers).

8. See, e.g., *Sony*, 464 U.S. at 417 (ruling on legality of VCRs). Videocassette sales and rentals are a ten billion dollar a year market with a total of \$250 billion invested in VCRs and VHS programming. See Joe Ryan, *Blank Video Tape Market Trends*, PRC NEWS, Jan. 11, 1999, at 5.

video cassette recorder “is to the American film producer and the American public as the Boston Strangler is to the woman alone.” Perhaps telling for the dispute over Napster, those claims of doom have proven unsubstantiated.⁹

This adaptive process promotes legitimate aims of copyright policy in the United States.¹⁰ Innovative technologies such as Napster result in authors creating more works. These new works, along with prior works, are distributed more broadly at a lower cost so that the public has greater access to the intellectual heritage of the human race. This process of course requires new business models and rewards courageous innovators at the possible expense of entrenched interests. Egregious infringers merely free ride on the works of others without even the possibility of a substantial non-infringing use and without adding value or creating new markets.¹¹

9. Alfred C. Yen, *A Preliminary Economic Analysis of Napster: Internet Technology, Copyright Liability, and the Possibility Of Coasean Bargaining*, 26 U. DAYTON L. REV. 247, 252 n.20 (2001) (citing Adam Liptak and Diane Lahneer Zimmerman).

10. See, e.g., *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994) (explaining goals and effects of copyright law).

While it is true that *one* of the goals of the Copyright Act is to discourage infringement, it is by no means the *only* goal of that Act The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity.

Id. (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (holding “[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors”); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 941 (2d Cir. 1994) (rejecting defendant’s fair use defense to infringement of plaintiff’s copyrighted materials).

Nowhere in the case law is there support for the proposition that the monopoly granted by copyright is designed to ensure the holder a maximum economic return; rather, the law’s purpose is to balance competing interests—assuring the author a *fair* return, while permitting creative uses that build upon the author’s work.

Am. Geophysical Union, 60 F.3d at 941.

11. Napster’s P2P technology reduced transaction costs to locate hard to find music and permitted users to share MP3 files, a market that RIAA’s members were either unwilling or unable to exploit for commercial gain. The interwoven copyrights with contractual rights made licensing, usually the preferred option, problematic in the context of transmitting digital music. It is unclear which, if any, of the traditional licensing entities could grant Napster a license. For example, on a single CD, each track embodies at least two separate and distinct copyrighted works. In particular, each track has a copyright for both the owner of the sound recording and the owner of the composition. A single CD may have ten sound recordings embodying the compositions of ten music publishers. “Now multiply that times 3,000 record companies in the U.S., and 25,000 music publishers, [and] 27,000 new CDs per year. Separate individual negotiations for all these rights are simply not a viable option.” *Napster CEO: Act of Congress Needed to Remedy Complicated Licensing Morass that Threatens Internet Music*, at <http://www.napster.com/press-room/pr/010403.html>.

With Napster, we memorialize a company that failed neither in the marketplace nor in its technology, but instead in the courts. The irony of this is that in slaying Napster, the Recording Industry Association of America ("RIAA") removed the one obstacle that prevented technologies competing with Napster from flourishing.¹² The technological or business models of these competing services lack either the legal vulnerability of Napster under copyright or the practical vulnerability of not having a technological central nervous system against which courts may enforce orders.¹³ As a result, while courts may try to eradicate quasi-Napster and Napster-esque peer-to-peer file swapping services, these services will remain until some newer, better technology supplants them.¹⁴ This new technology will assuredly present an entirely new set of problems for copyright owners, would be infringers and legal pundits alike.

The theme of the symposium is the role of the missing direct infringer in recent copyright law and what lessons a cyber entrepreneur should learn from *Napster*. This article argues that direct infringers, before the bar of justice, serve a salutary purpose of giving a human face to the legal offense, assisting in the fact finding process and implicitly limiting the scope of the remedy to specifically infringing uses. First, this article introduces Napster and its peer-to-peer MP3 file sharing technology, and then discusses the trial and appellate courts' analyses of the *Napster* case, including the theories used to hold Napster liable. Further, this article analyzes the role of the direct infringer in copyright law, and concludes with some lessons resulting from the *Napster* cases.

12. See *Napster shutdown seen as potential boon for competitors*, CNN, July 27, 2000, available at <http://www1.cnn.com/2000/LAW/07/27/napster.backlash/>. "Other music-sharing services that could benefit from a Napster shutdown include Gnutella, Freenet, [Music City (i.e. Morpheus)], Scour Exchange, iMesh and CuteMX. One service, Audiofind, responded to news of the injunction by posting the message 'BYE BYE NAPSTER!!' on its Web site." *Id.*

13. See *id.* "The more than 100 central computers used by Napster made the company a clear target for the lawsuit. However, the injunction is likely to have no effect on Gnutella and other decentralized technologies in which song files are traded directly among a constantly changing collection of computer users." *Id.*

14. See Aaron M. Bailey, *A Nation of Felons?: Napster, the Net Act, and the Criminal Prosecution of File-Sharing*, 50 AM. U. L. REV. 473, 481 (2000). "Napster is but one of a host of file-sharing platforms now in use. Other platforms include Gnutella and Freenet that, unlike Napster, are examples of 'true' P2P software. These pure P2P systems do not rely on central servers or a connection to a web site search engine." *Id.* Because these types of software do not rely on a centralized system in order to operate, there is no "point" at which a court may exercise its power. See *id.*

II. NAPSTER, INC.: THE COMPANY AND MUSICSHARE TECHNOLOGY

Napster is a California based Internet start-up company that made its proprietary MusicShare software freely available on the Internet.¹⁵ Napster began as an attempt by a college student to facilitate music swapping among friends.¹⁶ "[T]he Napster service gives its users the unprecedented ability to 'locate music by their favorite artists in MP3 format.'"¹⁷ The contribution that Napster made to the Internet community was the ability to "conduct relatively sophisticated searches for music files on the hard drives of millions of other anonymous users."¹⁸ At one point, Napster grew at a rate of more than 200% per month, and users shared approximately 10,000 MP3 files per second.¹⁹ At its peak, approximately 100 users per second attempted to log into a Napster server.²⁰ While Napster is a for-profit entity, it provided its services to Internet users free of charge.²¹ The underlying Napster business model was never entirely clear, but court documents suggest that the company planned to avoid profit maximization (or even profit) until it reached a critical mass of users and MP3 files.²² At this unspecified point, Napster

15. See *A&M Records, Inc. v. Napster, Inc.*, 2000 WL 573136, at *1 (N.D. Cal. 2000) (describing how users who obtain Napster's software can then share MP3 music files with others logged-on to Napster system and MP3 files, which reproduce nearly CD-quality sound in compressed format, are available on variety of websites either for fee or free-of-charge). Napster allows users to exchange MP3 files stored on their own computer hard-drives directly, without payment. See *id.*

16. See *Napster I*, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, *Napster II*, 239 F.3d 1004 (9th Cir. 2001) (stating Napster, Inc. is start-up company based in San Mateo, California). "Although Napster was the brainchild of a college student who wanted to facilitate music-swapping by his roommate, . . . it is far from a simple tool of distribution among friends and family." *Id.*

17. *Id.* at 901 (noting "[Napster] takes the frustration out of locating servers with MP3 files by providing a peer-to-peer file sharing system").

18. *Id.* at 902 (quoting *Napster, Inc.*, 2000 WL 573136, at *1) (noting Napster will increase volume of music companies online sales by stimulating consumer investment in hardware and software needed to obtain and play MP3 files).

19. See *id.* (describing value of system grows as quantity and quality of available music increases).

20. See *id.* (emphasizing downloading on Napster has potential to disrupt promotional efforts of music companies because it does not involve any restrictions on timing, amount, or selection they impose when they offer free music files). On Napster, the user and not the copyright owner determines how much music they want to sample and how long they will keep it. See *id.*

21. See *Napster I*, 114 F. Supp. 2d at 902 (noting at time of decision, Napster collected no revenues and charges its clientele no fees). The plan was to delay the maximization of revenues while attracting a large user-base. See *id.* Napster, subsequent to the litigation, moved to a subscription model. See *Germany's Berterlsmann Say's It Plans to Offer Subscriptions to Napster*, WALL ST. J., Jan. 30, 2001, at A4.

22. See *Napster I*, 114 F. Supp. 2d at 902 (noting Napster asserts music companies suffer no injury, or de minimis injury, and rebuts presumption of irreparable harm). Napster does not contend that downloading entire copyrighted songs is de

planned to monetize its user base through targeted email, advertising, commissioned links to commercial websites and direct marketing.²³ Some estimates valued Napster's user base between sixty and eighty million dollars.²⁴

Using a paradigm commonly called "peer-to-peer file sharing,"²⁵ Napster's MusicShare software facilitated the transmission of MP3 files among its users.²⁶ MP3 files are near compact disk-quality sound recordings in a compressed format.²⁷ Compared to other digital audio formats, MP3 files are smaller, require less time and are better suited for transmission over the Internet.²⁸ Napster and its MusicShare software allowed users to share MP3 music files stored on individual computer hard drives with other Napster users across the Internet.²⁹ MusicShare would catalog individual com-

minimis copying, but rather that obtaining music using Napster does not displace CD sales. *See id.*

23. *See id.* (noting Napster's thoughts on charging fees for premium or commercial version of its software). A large user base that increases daily makes Napster, Inc. an attractive acquisition for larger, more established firms. *See id.*

24. *See id.* Napster Inc.'s value is measured in part, by the size of its user base. *See id.* After the onset of the litigation, Napster obtained substantial capital infusions. *See id.* "[I]n May 2000, the venture firm Hummer Winblad purchased a twenty-percent ownership interest in the company for 13 million dollars, other investors simultaneously invested 1.5 million dollars." *Id.*

25. "Peer-to-Peer [is] a type of network in which each workstation has equivalent capabilities and responsibilities." InSync Daily Music Industry News & Tips, *Word for the Day Archive*, available at <http://www.sweetwater.com/insync/word.tpl?find=peer-to-peer> (last visited Oct. 17, 2001).

26. *See* Free On-line Dictionary of Computing (FOLDOC), *MP3*, at <http://foldoc.doc.ic.ac.uk/foldoc/foldoc.cgi?query=MP3>.

MP3 [is] a digital audio compression algorithm that achieves a *compression factor of about twelve* while preserving sound quality. It does this by optimizing the compression according to the range of sound that people can actually hear. MP3 is currently (July 1999) the most powerful algorithm in a series of audio encoding standards developed under the sponsorship of the Moving Picture Experts Group (MPEG) and formalised by the International Organization for Standardization (ISO).

Id. (emphasis added); *see also Napster I*, 114 F. Supp. 2d at 901 (describing consumers can acquire MP3 files in two ways; first, users may download audio recordings that have already been converted into MP3 format by using Internet service such as Napster and secondly, users can "rip" software to copy audio compact discs directly on to their computer hard drive). Ripping the software compresses the millions of bytes of information on a typical CD into a smaller MP3 file that requires a fraction of the storage space. *See Napster I*, 114 F. Supp. 2d at 901.

27. *See A & M Records, Inc. v. Napster, Inc.*, 2000 WL 573136, at *1 (N.D. Cal. 2000) (noting MP3 is popular, standard format used to store audio files).

28. *See Napster I*, 114 F. Supp. 2d at 901 (adding player software enables consumers to play MP3 files and such software is available on Internet, possibly free of charge, and may be part of bundled software sold by PC manufacturers).

29. *See Napster*, 2000 WL 573136, at *1 (stating people who have downloaded Napster software can log-on to Napster system and share MP3 music files with other users who are also logged-on to system).

puter hard drives for MP3 music files, make the music files available for copying by other Napster users, and transfer exact copies of the users' MP3 files from one computer to another via the Internet.³⁰ The Napster model enabled speedy searches by sending the MP3 file catalogs from individual computer hard drives to central servers.³¹ The Napster central servers processed searches by obtaining queries from MusicShare users, and identified individual computer users holding MP3 files that matched the queries.³² Upon identifying individual computer users with matching query results, a music file transfer took place only between the requesting and supplying user, *i.e.*, between peers.³³

These functions were made possible by Napster's MusicShare software, available free of charge from Napster's Internet site, and Napster's 150 network servers and server-side software.³⁴ "Napster provide[d] technical support for the indexing and searching of MP3 files, . . . including a 'chat room,' where users c[ould] meet to discuss music, and a directory where participating artists c[ould] provide information about their music."³⁵ "Napster allow[ed] a user to locate other users' MP3 files in two ways: [(1)] through Napster's search function and [(2)] through its 'hotlist' function."³⁶

30. *See id.* at *1-2 (noting Napster users can upload or download MP3 files without payment to each other, Napster, or copyright owners).

31. *See id.* (describing MusicShare software interacts with Napster's server-side software when user logs on, automatically connecting user to one of some 150 servers that Napster operates; MusicShare software reads list of names of MP3 files that user has elected to make available).

32. *See id.* (noting MusicShare software reads list of names of MP3 files that user has elected to make available). The list is then added to a directory that users can search through to find the desired song and can then download it onto their hard drive. *See id.*

33. *See id.* (explaining user may also view list of files that exist on another user's hard drive and select file from that list).

34. *See Napster*, 2000 WL 573136, at *1-2 ("The MP3 file is actually transmitted over the Internet, but the steps necessary to make that connection could not take place without the Napster server."). "The Napster system has other functions besides allowing users to search for, request, and download MP3 files. For example, a requesting user can play a downloaded song using the MusicShare software. Napster also hosts a chat room." *Id.*

35. *Napster II*, 239 F.3d 1004, 1011 (9th Cir. 2001) (commenting Napster facilitates transmission of MP3 files between and among its users through process called "peer-to-peer" file sharing).

36. *Id.* at 1012. A Napster user may create a "hot list" of other users with similar musical tastes or interests. *See id.* If a hotlisted user logs on, the system alerts the user. *See id.* "[T]he user can [then] access an index of all MP3 file names in a particular hotlisted user's library and request [any] file" by clicking on the file name. *Id.* "The contents of the hotlisted user's MP3 file are not stored on the Napster system." *Id.*

A computer user's introduction to Napster began by downloading the MusicShare software.³⁷ After downloading and installing the MusicShare software, a user could access the Napster server-side software when the user logged on to one of 150 Napster servers.³⁸ As part of the setup process, the user created an account name and password.³⁹ Napster did not link the user's name and password with any biographical, demographical, or other individually identifying information.⁴⁰ Logging on to the system allowed Napster users to exchange copyrighted MP3 files without paying copyright holders, obtaining a license or other permission, or paying other users.⁴¹

"The [MusicShare] software [consisted of] a browser interface, search engine, and chat functions that operate[d] in conjunction" with the Napster servers.⁴² The MusicShare software permits a user to search for MP3 files by name from other users' MP3 file libraries that have been made available.⁴³ A user may search available MP3 files by song, name or artist.⁴⁴ When the user clicks on the name of a file, the Napster server communicates with the requesting user's computer and the "host user's"⁴⁵ computer to create a link between the two users so that downloading can begin.⁴⁶ The Napster server

37. See *Napster*, 2000 WL 573136, at *1 (noting Napster server gets necessary IP address information from host user, enabling requesting user to connect to host).

38. See *id.* (stating Napster developed policy making compliance with all copyright laws "term of use" of its service and warns users "Napster will terminate the accounts of users who are repeat infringers of the copyrights, or other intellectual property rights, of others"). In addition, there is a provision that states "Napster reserves the right to terminate the account of a user upon any single infringement of the rights of others in conjunction with use of the Napster service." *Id.*

39. See *Napster I*, 114 F. Supp. 2d 896, 905 (N.D. Cal. 2000).

40. See *id.* (noting after user logs-on, user's physical address information is no longer available to Napster server).

41. See James E. Murrill, Jr., *Sounds and Silence: Downloading and Fair Use in A & M Records, Inc. v. Napster, Inc.*, 24 AM. J. TRIAL ADVOC. 469, 469-70 (2000).

42. *Napster I*, 114 F. Supp. 2d at 905 (describing Napster software may be used to play and categorize audio files that can be stored in specific file directories on user's hard drives). These directories are referred to as the "user libraries;" some users use such directories and others do not. See *id.*

43. See *Napster*, 2000 WL 573136, at *1-2. The MP3 file names are the names given by the host user to the MP3 file. See *id.*

44. See *id.* (explaining if user wants to locate song, she enters song's name or name of recording artist on search page of MusicShare program and clicks "Find It" button).

45. See *id.* at *1 n.2 (noting "host user" is one who is making MP3 file available for downloading).

46. See *id.* at *1. "When the requesting user clicks on the name of a file, the Napster server communicates with the requesting user's and host user's MusicShare software browser to facilitate a connection between the two users and initiate the downloading of the file without any further action on either user's part." *Id.*

then routes the request to the host computer's Napster interface browser.⁴⁷ The host computer's browser responds whether or not it can supply the requested file.⁴⁸ "If the host [computer] can supply the file, the Napster server communicates the host's address and routing information to the requesting user's browser, allowing the requesting user to make [the] connection . . . and receive the . . . file."⁴⁹ Napster locations are transient.⁵⁰ User locations are added or deleted each time the user logs on or off the system.⁵¹ The file is transmitted over the Internet and *not through* the Napster server.⁵² All files reside on the computers of Napster users and are directly transmitted between the hard drives of the host and recipient machines.⁵³ The files do not ever *reside on or transit through* a Napster server, which is why Napster has strong arguments against possible claims that it directly infringed copyrighted works, but this technology model made asserting a defense under section 512 of the Digital Millennium Copyright Act problematic.⁵⁴

III. A&M RECORDS, INC. v. NAPSTER, INC.

Napster did not violate the Copyright Act directly because file interchange did not involve its servers directly containing or transmitting music files. "The Copyright Act . . . [does] not include any statutory provision providing for [secondary] liability [for copyright infringement.]"⁵⁵ The lack of such a statutory provision does not

47. See *id.* at *2 (explaining to download desired file, user highlights it on list and clicks "Get Selected Songs" button).

48. See *Napster*, 2000 WL 573136, at *2.

49. *Id.* ("The parties disagree about whether this process involves a hypertext link that the Napster server-side software provides.").

50. See *id.*

51. See *Napster I*, 114 F. Supp. 2d 896, 905 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). "Indeed, after a user logs-on, her physical address information is no longer available to the Napster server." *Id.*

52. See *Napster*, 2000 WL 573136, at *2 (explaining Napster only facilitates transmission between users).

53. See *id.* at *8 (emphasis added). "Nevertheless, the court finds that Napster does not provide connection 'through' its system." *Id.*

54. See *id.* (emphasizing files not on Napster server).

55. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04[A], at 12-66.1. "Congress' use of the phrase 'to authorize' establishes the liability, whether vicarious or as a contributory infringer, of one who does no more than cause or permit another to engage in an infringing act." *Id.* at 12-66.1 to -67; see also H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674. "Use of the phrase 'to authorize' is intended to avoid any questions as to the liability of contributory infringers." H.R. REP. NO. 94-1476, at 61.

prevent courts from imposing liability on parties who have not directly infringed under the Copyright Act.⁵⁶

In delineating the contours of this third-party liability, and because copyright is analogous to a species of tort, "common law concepts of tort liability are relevant in fixing the scope of the statutory copyright remedy" Guided, therefore, by well established precepts of tort liability, it appears that two avenues of third-party liability in copyright have grown up in the law – "vicarious liability" (grounded in the tort concept of *respondeat superior*) and "contributory infringement" (founded on the tort concept of enterprise liability).⁵⁷

These common law doctrines, not codified in the Copyright Act, allowed the plaintiff's stated claim against Napster.

The plaintiffs alleged that Napster was a contributory and vicarious copyright infringer.⁵⁸ After receiving evidence, the district court preliminarily enjoined Napster "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner."⁵⁹ On appeal, the United States Court of Appeals for the Ninth Circuit affirmed in part, reversed in

56. See *Sony Corp. v. Universal Studios*, 464 U.S. 417, 435 (1984). "[V]icarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." *Id.*

57. *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988) (quoting *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966)). "[T]he lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn." *Id.* (quoting *Sony*, 464 U.S. at 435 n.17).

58. See *Napster II*, 239 F.3d 1004, 1011 (9th Cir. 2001). Although there is evidence in the record to support such a claim, the plaintiff's did not allege that Napster, Inc. was a direct infringer. See *id.* Evidence in the record included Napster, Inc. executives and employees downloading and storing copyrighted MP3 files on office machines. See *Napster I*, 114 F. Supp. 2d 896, 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). "Plaintiffs are engaged in the commercial recording, distribution and sale of copyrighted musical compositions and sound recordings." *Napster II*, 239 F.3d at 1010-11. On December 6, 1999, A & M Records and seventeen other record companies filed a complaint, and approximately a month later, plaintiffs Jerry Leiber, Mike Stoller, and Frank Music Corporation filed a complaint on behalf of a class of similarly situated music publishers. See *Napster I*, 114 F. Supp. 2d at 900.

59. *Napster I*, 114 F. Supp. 2d at 927 (noting this injunction applies to all such works plaintiffs own and is not limited to those listed in two schedules of complaint).

part and remanded for further proceedings.⁶⁰ Although the trial court's record is worthy of discussion,⁶¹ this section will focus on the *Napster* case as it was decided by the Ninth Circuit and will be largely limited to the facts in the case as discussed in the appellate decision.

A. Claims

"To prevail on a contributory or vicarious copyright infringement claim, a plaintiff must show direct infringement by a third party."⁶² In order to show direct infringement, the plaintiffs "must show ownership of the allegedly infringed material and . . . must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106."⁶³

1. *Direct Infringement*

"Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party."⁶⁴ Napster did not appeal the district court's conclusion that the plaintiffs presented a *prima facie* case of direct infringement by Napster users.⁶⁵ As a result, the Ninth Circuit limited itself to the observation that, "[t]he record supports the district court's determination that as much as eighty seven percent of the files available on Napster may be copyrighted and more than seventy percent may be

60. See *Napster II*, 239 F.3d at 1029 (holding preliminary injunction issued by district court prior to appeal shall remain stayed until it is modified by district court to conform to requirements of opinion). A partial remand of the case was ordered to permit the district court to proceed with the settlement and entry of the modified preliminary injunction. See *id.*

61. See generally Shawn D. Chapman, *Pushing the Limits of Copyright Law and Upping the Ante in the Digital World: The Strange Case of A&M Records, Inc. v. Napster, Inc.*, 89 Ky. L. Rev. 703 (2001).

62. *Napster I*, 114 F. Supp. 2d at 911 (citing *Sony*, 464 U.S. at 434). But see ITSI T.V. Prods., Inc. v. Cal. Auth. of Racing Fairs, 785 F. Supp. 854, 860 (E.D. Cal. 1992), *aff'd in part, rev'd in part*, 3 F.3d 1289 (9th Cir. 1993) (holding Congress created new form of "direct" infringement when it amended Copyright Act to include words "to authorize," and individuals may be contributorily or vicariously liable for such direct acts of infringement).

63. *Napster II*, 239 F.3d at 1013 (citing 17 U.S.C. § 501(a) (1994)) (explaining infringement occurs when alleged infringer engages in activity listed in § 106).

64. *Id.* at n.2. "There can be no contributory infringement by a defendant without direct infringement by another." *Id.* (quoting *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995)).

65. See *id.* at 1013 (addressing threshold requirements of infringement and fair use).

owned or administered by plaintiffs.”⁶⁶ The district court further determined that plaintiffs’ exclusive rights under section 106 were violated. Pursuant to this determination, the Ninth Circuit explained that, “here the evidence establishes that a majority of Napster users use the service to download and upload copyrighted music And by doing that the uses constitute direct infringement of plaintiffs’ musical compositions, [and] recordings.”⁶⁷ Napster users infringed at least two of the copyright holders’ exclusive rights, which are the right of reproduction under section 106(1) and the right of distribution under section 106(3).⁶⁸ Napster users who upload file names for others to copy violate the plaintiffs’ distribution rights.⁶⁹ Also, “Napster users who download files containing copyrighted music violate plaintiffs’ reproduction rights.”⁷⁰

A copyright owner’s exclusive rights under section 106 are not absolute. Section 106 rights, for example, are limited by sections 107-121, the fair use provisions of the Copyright Act.⁷¹ “Napster contend[ed] that its users [did] not directly infringe plaintiffs’ copyrights because the users [were] engaged in fair use of the material.”⁷² In particular, Napster identified three specific fair uses: “sampling, where users make temporary copies of a work before purchasing; space-shifting, where users access a sound recording through the Napster system that they already own in audio CD format and; permissive distribution of recordings by both new and es-

66. *Id.* (quoting *Napster I*, 114 F. Supp. 2d at 911) (noting plaintiffs must satisfy two requirements to present prima facie case of direct infringement). The two requirements are that plaintiffs must show (1) ownership of the material and (2) that the infringers violated at least one exclusive right granted to the copyright holders. *See id.* The court held “[p]laintiffs have sufficiently demonstrated ownership.” *Id.*

67. *Id.* at 1013-14 (quoting *A&M Records Inc. v. Napster*, 2000 WL 1009483, at *1 (N.D. Cal. July 26, 2000)) (stating that district court also noted Napster pretty much acknowledged their behavior constituted infringement).

68. *See Napster II*, 239 F.3d at 1014 (agreeing with lower court determination that Napster violated two exclusive rights in copyright).

69. *See id.* (agreeing plaintiffs have shown Napster users infringe at least two of copyright holders’ exclusive rights: rights of reproduction and rights of distribution).

70. *Id.* (noting Napster’s affirmative defense to charge that its users directly infringe plaintiffs’ copyrighted musical compositions and sound recordings).

71. *See* 17 U.S.C. § 106 (1994). “Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following” *Id.*

72. *Napster II*, 239 F.3d at 1014. “The fair use of a copyrighted work . . . is not an infringement of copyright.” *Id.* (quoting 17 U.S.C. § 107).

established artists.”⁷³ “Fair use” requires the court to balance at *least* the four factors enumerated in section 107 of the Copyright Act.⁷⁴ The factors the court must consider include: “(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the ‘amount and substantiality of the portion used’ in relation to the work as a whole; and (4) the effect of the use upon the potential market for the work or the value of the work.”⁷⁵

The first factor, “the purpose and character of the use,” focuses on whether the alleged infringing work is a mere substitute for the original or whether it has a different nature or character.⁷⁶ “In other words, this factor asks ‘whether and to what extent the new work is transformative.’”⁷⁷ In evaluating the “purpose and character” factor, the district court must also “determine whether the alleged infringing use is commercial or noncommercial.”⁷⁸ “The district court concluded that downloading MP3 files does not transform the copyrighted work.”⁷⁹ Rather, the work was merely copied from the host computer to the recipient’s computer without any transformation.⁸⁰ The second element in the “purpose and character of use” factor required the district court to consider whether the use was commercial or noncommercial.⁸¹ A finding of “[a] commercial use weighs against a finding of fair use.”⁸² The Ninth Circuit affirmed the district court’s finding that Napster users participated in infringing use that was commercial in nature:

The district court determined that Napster users engaged in commercial use of the copyrighted materials

73. *Id.* (noting district court first conducted general analysis of reasoning to alleged fair uses identified by Napster and then concluded Napster users are not fair users).

74. *See* 17 U.S.C. § 107 (1994) (listing four factors guiding fair use determination).

75. *Napster II*, 239 F.3d at 1014 (paraphrasing § 107 requirements).

76. *See id.* at 1015 (explaining function of first factor).

77. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

78. *Id.* (referring to commercial-noncommercial distinction).

79. *Id.* (citing *Napster I*, 114 F. Supp. 854, 912 (N.D. Cal. 2000), *aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001)).

80. *See Napster II*, 239 F.3d at 1015. “Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium.” *Id.*

81. *See id.* (noting commercial use is demonstrated by showing that repeated and exploitative unauthorized copies of copyrighted works were made to save expense of purchasing authorized copies). *But see Kelly v. Ariba Scott Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999) (holding that a search engine which permitted users to search images online and reproduce them in thumbnail format was transformative).

82. *Napster II*, 239 F.3d at 1015 (describing commercial use as strong indicator against fair use).

because (1) "a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester" and (2) Napster users get for free something they would ordinarily have to buy.⁸³

According to the Ninth Circuit, a "[d]irect economic benefit is not required to demonstrate a commercial use," but "rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use."⁸⁴

The second factor that the court must consider is the "nature of the use" of the copyrighted work.⁸⁵ Creative works are "closer to the core of intended copyright protection" than are more fact-based works because copyright protects creative expression rather than facts.⁸⁶ The district court found that "copyrighted musical compositions and sound recordings are creative in nature . . . which cuts against a finding of fair use under the second factor."⁸⁷

The third factor that the court must consider is "the amount and substantiality of the portion used."⁸⁸ "While 'wholesale copying does not preclude fair use per se,' copying an entire work 'militates against a finding of fair use.'"⁸⁹ The trial court found that Napster users copied entire works.⁹⁰ The Ninth Circuit further determined this factor weighed against a finding of fair use.⁹¹

The fourth factor is the "effect of use on the market for copyrighted work."⁹² "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of

83. *Id.* (quoting *Napster I*, 114 F. Supp. 2d at 912). The district court also found persuasive authority in the No Electronic Theft Act. *See id.* "[T]he definition of a financially motivated transaction for the purposes of criminal copyright actions includes trading infringing copies of a work for other items, 'including the receipt of other copyrighted works.'" *Id.* (citing No Electronic Theft Act ("NET Act"), Pub. L. No. 105-147, 111 stat. 2678 (1997) 18 U.S.C. § 101 (1976)).

84. *Napster II*, 239 F.3d at 1015 (explaining Napster counters even if certain users engage in commercial use by downloading instead of purchasing music, space-shifting and sampling are nevertheless noncommercial in nature).

85. *See Napster II*, 239 F.3d at 1016 (addressing second fair use factor).

86. *Id.* at 1016 (quoting *Campbell*, 510 U.S. at 586).

87. *Id.* (quoting *Napster I*, 114 F. Supp. 2d at 913).

88. *See id.* (noting under certain circumstances, court may conclude use is fair even when protected work is copied in its entirety).

89. *Id.* (quoting *World Wide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000)).

90. *See Napster II*, 239 F.3d at 1016 (citing *Napster II*, 114 F. Supp. 2d at 913).

91. *See id.* at 1016 (citing *World Wide*, 227 F.3d at 1118). *See generally* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (acknowledging fair use of time-shifting necessarily involves making full copy of protected work).

92. *See id.*

the work which is copied.”⁹³ The district court found that Napster harmed the actual market for the copyrighted works and created an entry barrier preventing the copyright owners from exploiting the potential market for their works in a digital online format.⁹⁴ It is irrelevant whether the copyright owner exploits or even intends to exploit a market. There mere fact that there is a potential for the work and the alleged infringing use has an adverse effect on the market is enough.⁹⁵

“Napster maintain[ed] that its identified uses of sampling and space-shifting were wrongly excluded as fair uses by the district court.”⁹⁶ The Ninth Circuit affirmed the district court’s finding that sampling, even by individual users who ultimately purchase the music, was not a fair use.⁹⁷ “Napster also maintain[ed] that space-shifting is a fair use.”⁹⁸ “Space-shifting occurs when a Napster user downloads MP3 music files in order to listen to music” the user has previously purchased.⁹⁹ The Ninth Circuit noted that “once a user lists a copy of music he already owns on the Napster system in order to access the music from another location, the song becomes ‘available to millions of other individuals’ not just the original CD owner.”¹⁰⁰ Having found direct infringement that was not excused by section 107 of the Copyright Act, the court then proceeded to analyze Napster’s liability as a secondary infringer.¹⁰¹

93. *Id.* (quoting *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 566-67 (1985)).

94. *See id.* (discussing harm Napster’s conduct caused to market).

95. *See Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994).

96. *Napster II*, 239 F.3d at 1017.

97. *See id.* at 1019. The *Napster* court conflated two uses when they respectively held and affirmed that space-shifting was not a fair use. *See id.* Insofar as the *individual* user space-shifts music the user already owned, it was a fair use. *See id.* Once the music is available to millions through the Internet and users download it, their use of the music does not necessarily constitute a fair use. *See id.*

98. *Id.*

99. *Id.* This rhetorical argument does not address the space-shifting fair use contention. A user posting music so that he or she may listen to it at a different location is space-shifting and arguably a fair use for the user. The acts of others downloading the music may not be a fair use. The user, therefore, is excused while others are infringers.

100. *Id.* This logic echoes the dissent in *Sony*. Acts that are harmless in isolation may be harmful in the aggregate. *See Sony Corp. v. Universal Studios Inc.*, 464 U.S. 417, 480-81 (Blackmun, J., dissenting).

101. *See Napster II*, 239 F.3d at 1019 (addressing contributory and vicarious copyright infringement claims).

2. *Contributory Infringement*

"Traditionally, 'one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer.'"¹⁰² "[L]iability exists if the defendant engages in 'personal conduct that encourages or assists the infringement.'"¹⁰³ "Contributory liability requires that the secondary infringer 'know or have reason to know' of direct infringement."¹⁰⁴

The Ninth Circuit court followed *Sony's* guidance on substantial noninfringing uses.¹⁰⁵ Specifically, the Ninth Circuit stated that:

The *Sony* Court declined to impute the requisite level of knowledge where the defendants made and sold equipment capable of both infringing and "substantial noninfringing uses" We are bound to follow *Sony*, and will not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights.¹⁰⁶

The district court found that Napster had actual knowledge for two reasons. First, Napster co-founder Sean Parker acknowledged "the need to remain ignorant of users' real names and IP addresses 'since they are exchanging pirated music.'"¹⁰⁷ Second, the RIAA notified Napster of more than 12,000 infringing files.¹⁰⁸ The district court found the following evidence of constructive knowledge: "(a) Napster executives have recording industry experience; (b) they have enforced intellectual property rights in other instances; (c) Napster executives have downloaded copyrighted songs from the system; and (d) they have promoted the site with 'screen shots listing infringing files.'"¹⁰⁹ Because Napster executives knew of specific infringing materials and failed to remove that material, Nap-

102. *Id.* (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

103. *Id.* (quoting *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998)).

104. *Id.* at 1020 (explaining constructive and actual knowledge requirements) (quoting *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845-46 n.29 (11th Cir. 1990)).

105. *See id.*

106. *Napster II*, 239 F.3d at 1020-21 (citation omitted).

107. *Id.* at 1020 n.5 (quoting *Napster I*, 114 F. Supp. 2d 896, 919 (9th Cir. 2001) *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001)).

108. *See id.* (citing *Napster I*, 114 F. Supp. 2d at 919).

109. *Id.* (quoting *Napster I*, 114 F. Supp. 2d at 919).

ster contributed to direct infringement.¹¹⁰ Napster, therefore, materially contributed to the direct infringement of the copyrights because “[w]ithout the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts.”¹¹¹

3. *Vicarious Copyright Infringement*

The district court found and the Ninth Circuit affirmed that Napster engaged in vicarious copyright infringement.¹¹² “Vicarious copyright liability is an ‘outgrowth’ of respondeat superior.”¹¹³ “In the context of copyright law, vicarious liability extends beyond an employer/employee relationship to cases in which a defendant ‘has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.’”¹¹⁴

Financial benefit exists where the availability of infringing material “acts as a ‘draw’ for customers.” Ample evidence supports the district court’s finding that Napster’s future revenue is directly dependent upon “increases in userbase.” More users register with the Napster system as the “quality and quantity of available music increases” The district court determined that Napster has the right and ability to supervise its users’ conduct.

The ability to block infringers’ access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise Napster ha[d] an express reservation of rights policy, stating on its website that it expressly reserves the “right to refuse service and terminate accounts in [its] discretion, including, but not limited to, if Napster believes that user conduct violates applicable law . . . or for any reason in Napster’s sole discretion, with or without cause.” To escape imposition of

110. See *id.* at 1022 (concluding Napster’s knowledge and failure to act constituted contributory infringement).

111. *Id.* (quoting *Napster I*, 114 F. Supp. 2d at 919-20).

112. See *id.* at 1024. “Our review of the record requires us to accept the district court’s conclusion that plaintiffs have demonstrated a likelihood of success on the merits of the vicarious copyright infringement claim.” *Id.*

113. *Id.* at 1022 (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996)).

114. *Id.* (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

vicarious liability, the reserved right to police must be exercised to its fullest extent.¹¹⁵

Finally, the *Napster* court found that the “staple article of commerce” doctrine “provides a defense only to contributory infringement, not to vicarious infringement.”¹¹⁶

B. Defenses

Napster buttressed its position with a plethora of defenses.¹¹⁷ In particular, Napster asserted defenses under the Audio Home Recording Act of 1992 (“AHRA”), the Digital Millennium Copyright Act (“DMCA”),¹¹⁸ an implied license defense and the copyright misuse doctrine. The Ninth Circuit, however, rejected all of these defenses.¹¹⁹

Napster asserted that its users engaged in actions protected by the AHRA¹²⁰ and the DMCA,¹²¹ which limit both liability for contributory and vicarious infringement.¹²² The district court held the AHRA “‘irrelevant’ to the action because: (1) plaintiffs did not bring claims under the AHRA; and (2) the AHRA does not cover the downloading of MP3 files.”¹²³ The Ninth Circuit agreed that

115. *Napster II*, 239 F.3d at 1023 (citations omitted) (stating if right to police is not used to fullest extent, it will give rise to liability).

116. *Napster II*, 239 F.3d at 1022 (quoting 617 PLI/Pat 455, 528 (Sept. 2, 2000)).

117. *See id.* at 1024 (stating if Napster asserted valid defenses, entry of preliminary injunction would be precluded).

118. *See* 17 U.S.C. § 1008 (1994); 17 U.S.C. § 512 (1999).

119. *See Napster II*, 239 F.3d at 1024 (holding AHRA does not cover downloading MP3 files to computer hard drives). The DMCA is not applicable per se, but must be more fully developed at trial. *See id.* at 1025. The record supports the conclusion that no evidence exists for an implied license defense and that there was no error in the district court’s rejection of copyright misuse doctrine as a defense for Napster. *See id.* at 1026.

120. *See* 17 U.S.C. § 1008. “No action may be brought under [The Audio Home Recording Act] alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.” *Id.* (emphasis added).

121. 17 U.S.C. § 512.

122. *See Napster II*, 239 F.3d at 1024 (stating Napster asserted their users engaged in actions protected by AHRA and Napster’s liability was limited through DMCA).

123. *Id.* (citing *Napster I*, 114 F. Supp. 2d 896, 916 n.19 (N.D. Cal. 2000), *aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001)) (holding AHRA is irrelevant to instant action because neither party brought claims under Act and MP3 files are not covered under Act). The court was free to apply 17 U.S.C. § 1008 by analogy as an addition to the four § 107 “fair use” factors. *See id.* The four enumerated factors under § 107 are not exhaustive. *See Harper & Row Publishers, Inc. v. Nation*

“the [AHRA] does not cover the downloading of MP3 files to computer hard drives.”¹²⁴ The court reasoned that “[u]nder the plain meaning of the [AHRA’s] definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their ‘primary purpose’ is not to make digital audio copied recordings.”¹²⁵

Napster also asserted “the protections of the safe harbor from copyright infringement suits for Internet service providers contained in the [DMCA]” as a defense.¹²⁶ The Ninth Circuit found this issue to be best addressed on a complete record at trial.¹²⁷ A substantial question of whether the safe harbor provisions of the DMCA are applicable to secondary infringers, therefore, remains unanswered.¹²⁸

Napster also argued that “plaintiffs granted the company an implied license by encouraging MP3 file exchanges over the Internet.”¹²⁹ The Ninth Circuit dismissed this defense because courts tend to find implied licenses only when one party “created a work at [the other’s] request and handed it over, intending that [the other] copy and distribut[ing] it.”¹³⁰

Finally, Napster asserted a defense under the emerging doctrine of copyright misuse.¹³¹ The copyright misuse doctrine “forbids a copyright holder from ‘secur[ing] an exclusive right or limited monopoly not granted by the Copyright Office.’”¹³² The defense of copyright misuse applies when a copyright owner attempts to use his or her limited monopoly to gain an advantage in

Enters., 471 U.S. 539, 549 (1985) (holding “the statute notes four nonexclusive factors to be considered”). The *Napster* court could have looked to § 1008 as indicating a congressional intent that non-commercial consumer digital copies are a “fair use” of a copyrighted work. See *Napster II*, 239 F.3d at 1024.

124. *Napster II*, 239 F.3d at 1024.

125. *Id.* The implicit recognition by the court of space-shifting, under the RHRA should be persuasive analogous authority of space-shifting as a fair use under the Copyright Act.

126. *Id.* at 1025 (citing *Napster I*, 114 F. Supp. 2d at 919 n.24) (stating Napster asserted safe harbor protections under DMCA as possible defense to limit liability from copyright infringement suit).

127. See *id.* (stating DMCA is not applicable per se).

128. See *id.* (holding it would “not accept a blanket conclusion that § 512 of the [DMCA] will never protect secondary infringers”).

129. *Napster II*, 239 F.3d at 1026.

130. *Id.* (quoting *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc.*, 211 F.3d 21, 25 (2d Cir. 2000)).

131. See *id.* (setting out Napster’s alleged copyright misuse defense).

132. *Id.* (quoting *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977-79 (4th Cir. 1990)).

an area outside the monopoly granted by law.¹³³ Napster alleged that “on-line distribution is not within the copyright monopoly.”¹³⁴ “According to Napster, plaintiffs colluded to ‘use their copyrights to extend their control to online distributions.’”¹³⁵ The Ninth Circuit, however, found that the plaintiffs merely sought to enforce their rights under section 106 of the Copyright Act.¹³⁶

IV. SOME OBSERVATIONS ON THE DIRECT INFRINGER

As was briefly referred to earlier, one cannot be found liable as a secondary infringer unless there was a direct infringer.¹³⁷ Because Napster did not appeal the district court’s finding of direct infringement, the Ninth Circuit did not address this issue and stated that the evidence established direct infringement of the plaintiff’s musical recordings.¹³⁸ As a result, it is the district court’s opinion that provides the analysis in reaching this conclusion.

The trial court found that as much as eighty-seven percent of the music available on Napster is already copyrighted.¹³⁹ The court based this conclusion on the expert testimony produced by the plaintiffs.¹⁴⁰ The basic premise that eighty-seven percent of the

133. *See id.* (stating “the misuse defense prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly”).

134. *Napster II*, 239 F.3d at 1026.

135. *Id.*

136. *See id.* at 1027 (citing 17 U.S.C. § 106 (1994)) (holding there was no evidence plaintiffs sought to control areas outside their grant of monopoly and instead only sought to control reproduction and distribution of their copyrighted works).

137. *See id.* at 1013. “Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.” *Id.* at n.2 (citing *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995)) (holding “[t]here can be no contributory infringement by a defendant without direct infringement by another”).

138. *See id.* at 1014 (stating that because evidence established majority of Napster users downloaded copyrighted music, it constituted direct infringement of plaintiffs’ musical compositions and recordings).

139. *See Napster I*, 114 F. Supp. 2d 896, 902-03, *aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001). (“The evidence shows that virtually all Napster users download or upload copyrighted files and that vast majority of the music available on Napster is copyrighted.”).

140. *See id.* at 903 n.6 (stating plaintiff’s expert produced hard evidence that plaintiffs or other copyright holders own or administer rights to 87.1 percent of files that are transferred via Napster). We can also consider the written findings of the trial court which explain in greater detail the evidentiary predicate for its finding. *See id.*

Plaintiffs’ expert, Dr. Ingram Olkin, a professor of statistics at Stanford University, divided his study into two projects. In the User Project, a sample list of users and file names was taken every hour for four days. Researchers culled a random sub-sample of 1,150 users from 28,000 sam-

MP3 files available using the Napster service were copyrighted should have only been the *starting point* in the district court's analysis, rather than the sufficient cause to prove unlawful copying and a corresponding shift to consider the paradigmatic affirmative defenses available under the copyright law.¹⁴¹

The district court's opinion focused largely on the sheer enormity of the Napster enterprise.¹⁴² In particular, the district court classified a large category of potentially legitimate uses as infringement.¹⁴³ The district court believed all unauthorized copying and distribution of copyright-protected material by Napster was illegal.¹⁴⁴ Yet, this case did not necessarily involve a direct infringer.¹⁴⁵ The district court erroneously conflated unauthorized use with infringing use because the district court's analysis took a global view of whether collective activities by Napster users were excused under

pled and determined that all 1,150 users offered to share at least two copyrighted songs. The Download Project performed downloads at eight separate times for a five-minute period and generated a list of 1,150 songs from a population of approximately 574,185 files. Olkin found that plaintiffs or other copyright holders own or administer the rights to 1,002 (or 87.1[%]) of the 1,150 files. Thirty-seven (or 3.2[%]) of the files are likely to be copyrighted and distributed without authorization. Dr. Olkin identified only three files (or .26[%]) which were clearly offered without objection from the rights holder, while 108 (or 9.4[%]) of the files did not present enough data to yield a conclusion. Charles J. Hausman, anti-piracy counsel for the RIAA, determined that 834 out of 1,150 files in Olkin's download database belonged to or were administered by plaintiffs and were exchanged on Napster without permission.

Id.

141. *See, e.g.*, 17 U.S.C. §§ 107-121, § 1008 (1994) (asserting various affirmative defenses under copyright law).

142. *See Napster I*, 114 F. Supp. 2d at 902 (stating at one point Napster was growing by more than 200% per month, that 10,000 MP3 files were shared per second and every second over 100 users attempted to connect to system).

143. *See id.* at 914 (ruling "[t]he global scale of Napster usage and the fact that users avoid paying for songs that otherwise would not be free militates against a determination that the sampling by Napster users constitutes personal or home use in the traditional sense"). The nature of the sound recordings are creative, so Napster cannot argue that they are entitled under a fair use defense to undermine copyright laws. *See id.* at 913.

144. *See id.* at 927.

145. *See Sony Corp. v. Universal Studios*, 464 U.S. 417, 447 (1984) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154-55 (1975)) ("Even unauthorized uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute."). The definition of exclusive rights under 17 U.S.C. § 106 is subject to §§ 107-118, and those sections describe a number of uses of copyrighted material that would not be infringements despite the § 106 provisions. *See id.* There is little doubt, however, that due to the large user population of Napster, at least one of the users was a direct infringer, but "knowing something" and "proving something" are quite different. *See id.*

the theory of fair use. This approach was also adopted by the Ninth Circuit.¹⁴⁶ However, Napster's *individual* users may have been protected under some paradigm of fair use because fair use is always an individual determination that depends upon the unique facts of the particular alleged infringing use.¹⁴⁷ Because no alleged direct infringers were before the court, the court could therefore rely on a sense of collective wrongdoing as it assumed at least some use must be an infringing use due to the sheer size of the Napster enterprise.¹⁴⁸

Some examples of potential non-infringing uses that result in "direct infringement" under this collectivist paradigm include: a law professor demonstrating Napster for a Cyberlaw class; an investigating attorney; a judge or law clerk downloading certain files for a better understanding of the issues in the case; members of the media demonstrating Napster as part of a news story; or individuals privately distributing MP3 files from Napster to friends or acquaintances.¹⁴⁹ These uses are examples of possible fair uses of Napster by individual users. While Napster might have some fair uses, the purpose of copyright law is to protect the public's interest by providing authors with an economic incentive to create new works.¹⁵⁰ In a case where a service or technology is being enjoined, not because of its own bad acts, but because it permits others to act unlawfully, the court should hear from the putative direct infringers in order to determine any impact on the public interest. One commentator suggested a better reading of *Sony* on the context of Napster: "Courts must consider the defendant's product as a whole rather than focusing on a single component of it. If a court reached this inquiry in *Napster*, for example, it would ask whether

146. See *Napster II*, 239 F.3d 1004, 1014-15 (9th Cir. 2001) (agreeing with district court that Napster users are not fair user).

147. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (holding "no generally applicable definition [of fair use] is possible, and each case raising the question must be decided on its own facts") (citation omitted); see also *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) (holding "[t]he fair use test remains a totality inquiry, tailored to the particular facts of each case"); RICHARD RAYSMAN, ET. AL. MULTIMEDIA LAW: FORMS & ANALYSIS § 5.08 (explaining fair use is fact specific and requires case by case determination).

148. See *People v. Collins*, 438 P.2d 33, 39 (Cal. 1968) (holding statistics provided by prosecution were inadequate because they lacked statistical independence). Therefore, courts see this kind of inference from statistical evidence as less probative. See *id.*

149. See 17 U.S.C. § 1008 (1994).

150. See *Napster II*, 239 F.3d at 1016 (stating "[w]orks that are creative in nature are closer to the core of intended copyright protection than are more fact based works"). Sound recordings are creative in nature and go closer to intent of copyright protection. See *id.*

non-infringing demand would justify the particular file-sharing service offered by Napster - a centralized music file-sharing service with multiple servers and all its special features It is quite likely that such software would have been created even if only for non-infringing purposes, even if the overall Napster service owns its existence to infringement."¹⁵¹

No evidence on the public's interest in Napster was presented to the district court; the court, however, considered Napster's impact on the market for on-line digital music services and its effect on the demand for compact disks ("CDs").¹⁵² The court found that Napster is likely to reduce CD sales of a key demographic group, namely college students.¹⁵³

The district court also found that Napster allowed college students to make a better CD purchase.¹⁵⁴ The court stated that students are more likely to download "free" music by using Napster than purchasing the CD.¹⁵⁵ This likelihood, however, does not necessarily militate against a finding of fair use. If students bought fewer CDs after deciding they did not value the songs from those CDs, for example, then this action may constitute a fair use. This scenario resembles the business strategy of placing music listening stations in record stores, which the Copyright Act exempts as a non-infringing activity.¹⁵⁶

There may be further support for a causal connection that a drop in CD sales is caused by music consumers having convenient access to preview music before a purchase and determining that the

151. Stacey L. Dogan, *Is Napster a VCR? The Implications of Sony for Napster and other Internet Technologies*, 52 HASTINGS L.J. 939, 959 (2001).

152. See Napster I, 114 F. Supp. 2d 896, 909 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001) (holding Napster will reduce CD purchases by college students).

153. See *supra* note 140 and accompanying text. Plaintiff produced an expert who produced surveys showing that forty-one percent of the college student respondents stated that they used Napster to displace their regular CD sales. See Napster I, 114 F. Supp. 2d at 909. The expert further looked at the retail stores near college campuses and found that online file sharing like the Napster technology resulted in a loss of album sales in college markets. See *id.* at 909-10.

154. See Napster I, 114 F. Supp. 2d at 909 (stating "twenty-one percent of the college students surveyed revealed that Napster helped them make a better selection or decide what to buy").

155. See *id.* at 910 (holding students are more likely to use free Napster service rather than purchase music either at pay-per-download site or at music store).

156. See 17 U.S.C. § 110(7) (1994) ("[P]erformance of a nondramatic musical work by a vending establishment open to the public at large without . . . admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, . . . and the performance is not transmitted beyond the place where the establishment is located and is within the immediate areas where the sales is occurring [is not an infringing use].").

actual CD is not worth the price. Many music consumers complain that they are being “ripped off” by the record industry because “they” package CDs having only one or two “good” songs with eight or nine “bad” songs. One can argue that Napster provided a convenient listening station similar to those in music stores that allow a purchaser to preview the CD before they buy it; one that does not require the purchaser to stand around in a store for long periods of time wearing headphones glazed with the ear wax of hundreds of preceding patrons. Of course, if students bought fewer CDs because they downloaded music that they otherwise would have bought, this use would not constitute a fair use. The district court, however, merely indicated that Napster had an adverse effect on the CD purchases near some universities.¹⁵⁷ The exact role that Napster played in affecting the market was at best ambiguous based on the district court’s findings.¹⁵⁸ Absent an affirmative finding that Napster users found Napster to be a market substitute for music purchases, the value of this sort of evidence is questionable.

The absence of a direct infringer or evidence of a representative class of direct infringing users, before the court, resulted in a significant factual void. Professor Nimmer stated the better paradigm by recognizing that “it is permissible for a plaintiff to name as a defendant solely a contributory infringer or one who is vicariously liable, such as in circumstances where the direct infringer is not subject to service of process or is unknown.”¹⁵⁹ In *Napster* there was a surfeit of potential direct infringer-defendants.

Conceptually, the need for the direct infringer is akin to, but not identical to, the justification for standing or the requirement for a case or controversy. As Justice Brennan has observed, “[having the parties with] such a personal stake in the outcome of the controversy [assures] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions [is present.]”¹⁶⁰ Clearly, Napster and the plaintiffs were adverse to each other, but, the *Napster* ruling potentially could have an even greater impact on the sixty-five million Napster users who represent the third party beneficiaries of copyright law and the future development of peer-

157. See *supra* note 126.

158. See *Napster I*, 114 F. Supp. 2d at 909.

159. NIMMER, *supra* note 55, at § 12.04 [A][3][a], at 12-82 (citations omitted).

160. *Baker v. Carr*, 369 U.S. 186, 204 (1962) (stating “this is the gist of the question of standing”). Since the decision in *Napster* labeled 65 million users as direct infringers, it is theoretically possible that the case created 65 million joint and severally liable defendants. See *Napster II*, 239 F.3d at 1004.

to-peer technology. These parties, however, were not properly represented before the court.

The absence of third party beneficiaries in a direct infringement action is not a novel approach. Prior litigation against major contributory infringers suggests this model. For example, *Sony* concerned a direct infringer *and* evidence of how other Betamax users (although not named defendants) actually used the machine.¹⁶¹ The model applied by the parties and the court in *American Geophysical Union v. Texaco, Inc.*¹⁶² is also instructive.¹⁶³ The parties and the court agreed that the issue of fair use should be decided through the files of arbitrarily selected research scientists employed by the defendant.¹⁶⁴ A random or arbitrary group of direct infringers represented a better model of Napster's user base. Because the direct infringers could have been the defendants and the plaintiffs could have agreed not to seek damages from them (because there is joint and several liability), Napster could have impeded a sample of direct infringers to develop a complete record.¹⁶⁵ The parties could have also agreed on a representative group of direct infringers whose putative infringing acts would have become part of the record and would have been analyzed as representative of the whole.¹⁶⁶ Absent *specific* evidence of some alleged *specific* direct infringing activities, and without hearing the "voices" of the alleged direct infringers, however, the court was left to apply concrete concepts of law requiring a factual, case-by-case analysis in the abstract. The court, therefore, was unable to properly weigh the broader public policy factors of the *Napster* case.

This analysis recommends what a court should require as a *bare* minimum. Some commentators have taken a stronger stand urging

161. See *Sony Corp. v. Universal City Studio Inc.*, 464 U.S. 417, 423-24 (1984) (stating parties conducted surveys as to how Betamax machines were used by owners during specified time period).

162. 60 F.3d 913 (2d Cir. 1994).

163. See *id.* *Geophysical Union* is not a case based on theories of secondary liability. See *id.*

164. See *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 5 (stating because of "convenience and to avoid untoward discovery expenses with respect to largely duplicative matters, the stipulation provides that the trial of the issue of fair use be conducted with respect to eight photocopies found in the files of an arbitrarily selected one of Texaco's several hundred scientific researchers"). See also *Geophysical Union*, 60 F.3d 913 (affirming district court's analysis).

165. See *Little Mole Music v. Spike Invest. Inc.*, 720 F. Supp. 751, 755-56 (W.D. Mo. 1989) (holding copyright infringement can result in joint and several liability for all those directly or vicariously involved).

166. See *Sony*, 480 F. Supp. at 437. "Plaintiffs have waived any claim for damages or costs against Griffiths for his activities alleged in the complaint. Plaintiffs never expected Griffiths to be represented by counsel and he has not been." *Id.*

that courts should not decide contributory infringement cases involving a new technology unless there is a *represented* defendant to fully develop the defendant's fair use arguments.¹⁶⁷ I agree that the preferred approach would be to have a represented party before the court in order to develop the record and to articulate the public's interest in access and use of the challenged technology or service.

V. NAPSTER AS THE CYBER-ENTREPRENEUR CASE STUDY

Future cyber-entrepreneurs need to consider intellectual property rights of others in the design of their technology or business models. A few years ago, it was sufficient to know that your product *directly* infringed the intellectual property rights of others. Today, however, this is no longer the case. Rather, post-*Napster* cyber-entrepreneurs must consider the possibility of secondary liability under the possible theories of contributory or vicarious liability, and accordingly program their legal defenses into the design of the technologically possible legal defenses. It is not far fetched to see a day when software architects and intellectual property lawyers integrate their respective skills to design non-infringing technological and business models.

The best defense to a contributory or vicarious liability claim is that there is no direct infringement. Unfortunately, however, due to the decentralized nature of most Internet technology, the variety of uses and individual users and the fact specific nature of "fair use," constructing technology to integrate this "no direct infringement" defense is a difficult goal. As discussed earlier, even if some uses and users are exempt under the fair use provisions of the Copyright Act, a court is likely to find direct infringement from the sheer volume of files that are transferred on any commercially practicable network.¹⁶⁸

Napster raised the defense that it is capable of substantial non-infringing uses.¹⁶⁹ This defense is potentially applicable to future technologies. Future cyber-entrepreneurs should learn from *Napster* that mere functionality often equals more protection. If Napster had functioned more like a search engine and its software

167. See, e.g., Thomas G. Field, Jr., Commentary, *Reflections on the Betamax Decisions*, 22 IDEA 79 265, 266-67 (1982) (stating appellate court did not fully appreciate fact that not one single home user was represented party in litigation).

168. See *supra* notes 142-43.

169. See *Napster I*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001) (stating Napster raised affirmative defense that it is capable of substantial non-infringing uses).

permitted users to exchange any file format the “capable of a substantial non-infringing use” argument would be much stronger. The problem with the MP3 format is that it is embodied largely commercial copyrighted music. *Napster* teaches potential innovators that it is dangerous to ignore a cease and desist letter from copyright owners. Once the cyber-entrepreneur is on notice of an actual infringing activity, the defense that his service is “capable of substantial non-infringing use” is no longer sufficient to a contributory liability claim and may entail a redesign of the technology or business model in order to protect the interests of the copyright owner.¹⁷⁰

As interpreted by the Ninth Circuit, the “capable of substantial non-infringing use” defense is only a defense to contributory infringement.¹⁷¹ If the technology and business model results in “control over” and “direct financial benefit” from the alleged infringing use, the cyber-entrepreneur may find that the enterprise is liable under theories of vicarious infringement.¹⁷² Accordingly, technologies and business models based on providing on-going services (*i.e.*, subscription services) or based on community building models (*i.e.*, Napster) are inherently problematic if the technology or business model permits the cyber-entrepreneur to control access, users or use. Two options that potentially work are totalitarian control or total anarchy.¹⁷³ The cyber-entrepreneur may design secure networks that only transmit an authorized file type so that the network will permit only authorized non-infringing uses or create a technology and business model that does not permit the enterprise to exercise any control over its use or users.

Some business models are more problematic however; for example, a subscription service providing for on-going services compared to a one-time licensing of technology. Most service business models will have inherently sufficient control for a court that is fol-

170. See *Napster II*, 239 F.3d at 1021 (stating once computer operator learns of specific infringing material on his system and fails to purge such material, operator knows of and contributes to direct copyright infringement regardless of whether system is capable of substantial non-infringing uses).

171. See *id.* (holding absent specific information which identifies infringing activities, computer system operator cannot be liable for contributory infringement merely because structure of system allows for exchange of copyrighted material).

172. See *id.* at 1023 (stating Napster has financial benefit from users and right and ability to control its users, therefore engaging in vicarious copyright infringement).

173. Total control or total anarchy is most easily achieved by selling or licensing a free standing product capable of substantial non-infringing uses without providing any direct support services; this is the classic case of Sony and Betamax.

lowing the *Napster* precedent to find control, even if it is never exercised, and in practical terms its exercise may be futile. For example, Napster had the right to terminate repeat infringing users, but those users could then immediately create new accounts and continue with their illegal activities. After *Napster*, courts may find a "financial benefit" in any business model or technology that aggregates a large group of users. This aggregation will frequently be incidental to any successful technology. As a result, it is unlikely that a cyber-entrepreneur could eliminate the direct financial benefit element from a successful business model or technology.

The cyber-entrepreneur should consider which of the *narrowly defined* safe harbor provisions of the DMCA might apply to the business model or technology and comply with the procedures established by section 512.¹⁷⁴ But, section 512 only precludes mandatory damages. The cyber-entrepreneur may still be put out of business by the court through a restraining order or other format injunctive relief. Section 512 provisions require that the business adopt, implement, and notify users of a policy that terminates the accounts of repeat infringers. The provisions also require the business to accommodate industry wide "standard technical measures," as well as designate a copyright agent to receive notices of alleged infringement.¹⁷⁵ Furthermore, the business met the copyright office of the designated agent and placed notice of the designated agent on the web page.¹⁷⁶ Finally, upon notification, the business must remove or disable access, either know or should know of the alleged infringing activity and shall not receive a direct financial benefit.¹⁷⁷

174. See 17 U.S.C. § 512(a) (1999) ("[S]ervice providers shall not be liable . . . if transmission of the material was initiated by or at the direction of a person other than the service provider, the transmission, routing, provision of connections, or storage is carried through an automatic technical process without selection of the material by the provider, the service provider does not select the recipients of the material except as an automatic response to the request of another person, no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system of network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections and the material is transmitted through the system or network without modification of its content.").

175. See 17 U.S.C. § 512(c) (2) (stating limitations on liability will only apply if service provider has designated agent to receive notifications of claimed copyright infringement).

176. See § 512(C)(2)(A) (stating service provider must include name, address, phone number and electronic mail address of notification agent on service provider's website).

177. See § 512(C)(1) (stating service providers will not be liable if it does not have actual knowledge that material is infringing, that it should not know of appar-

Accordingly, the cyber-entrepreneur must consider section 512 in the design and implementation of the business and technology model and not seek a section 512 safe harbor as an afterthought.¹⁷⁸

In summation, a prudent cyber-entrepreneur must establish a business and technology model so that the cyber-entrepreneur either knows or should know of potentially infringing activities. Further, the cyber-entrepreneur should advertise and focus on legal legitimate uses, not collect information on its use, create a technology that is susceptible to numerous legitimate uses, insure that its revenue stream is not tied directly or indirectly to infringing activities, aggregate functions and contract rights. The temptation is to be a one-stop shop. The more functions that entrepreneurs provide, however, the more likely the courts will find infringement and the broader the injunction they may issue.¹⁷⁹

VI. CONCLUSION

Two major lessons may be drawn from *Napster*. First, direct infringers are necessary in order to create a complete record of how a new technology is used so that the court may properly apply the fair use factors. Second, system architecture, technologies, business models and sound legal advice must be combined at the very start of any new technology venture, if that venture is to avoid failing in the courts despite being successful in the market. In essence, future cyber-entrepreneurs must be proactive; and they must synergistically consider their technology, business model and legal strategies as the enterprise moves from theoretical construct to reality.

As a final observation, the world will little note nor long mourn the passing of Napster. As Napster died,¹⁸⁰ it merely yielded space for newer and better technologies of competitors more capable of meeting the current needs of file-swappers. Napster's sixty-five million users have now found other, better opportunities.¹⁸¹

ent infringing activity, that it remove such material or activities immediately upon finding out that it is infringing, that it does not receive financial benefit and that it acts immediately upon being notified that it is infringing).

178. *See id.* Section 1012 prohibits, with limited exceptions, technology that circumvents digital rights management systems. *See* 17 U.S.C. § 1012 (1999).

179. Hypothetically, if Sony sold VTRs, blank VTR cassettes, ran a movie rental store, and rented second VTRs to customers, it may have turned out quite differently. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 417-18 (1984).

180. Napster "died" in its incarnation as a free service and under its old business model in response to the court's injunction.

181. *See supra* note 12 (listing potential Napster competitors).

